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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HOWARD C. LINCOLN,
NEIL C. LEROY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

I. Whether a defendant's right under the Fifth Amendment to The United States Constitution not to be placed twice in jeopardy prohibits the government from seeking a greater sentence under the Sentencing Guidelines based upon alleged criminal conduct of which defendant was acquitted at trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners HOWARD C. LINCOLN and NEIL C. LEROY respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 13, 1993.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported, but is reprinted in a separate appendix volume.

JURISDICTIONAL STATEMENT

On April 13, 1993, The United States Court of Appeals ruled that petitioners had been properly convicted under 18 U.S.C. Section 371 and rejected their argument that their sentences had been improperly enhanced by the use of alleged criminal conduct of which petitioners had been acquitted. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).[1]

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[1] The Court of Appeals remanded to the District Court a separate issue concerning petitioner's suppression motion. As there will be no further proceedings concerning the issues upon which review is now sought in this petition, this petition should be granted notwithstanding the remand on the unrelated suppression issue. The District Court has since declined to suppress the evidence and the case is again awaiting resentencing of the Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

Petitioner Lincoln was president of Lincoln Metal Processing, Inc., and Petitioner Leroy was an employee. Both petitioners were indicted under 18 U.S.C. Section 371 for conspiring to transport stolen property in interstate commerce in violation of 18 U.S.C. Section 2314, and for seven (7) counts of substantive violations of 18 U.S.C. Section 2314.

Count One of the indictment alleged that petitioners had conspired to obtain high grade copper from the General

Electric Company facility in Erie County, Pennsylvania, which had a contract with Lincoln Metal to remove scrap metal from the facility. The indictments alleged that petitioners conspired to mix the high grade cooper with other scrap metal that was being removed from the General Electric facility, and then have the copper removed and sent out of Pennsylvania. Counts Two through Eight each alleged that petitioners had in fact illegally removed a quantity of copper from the General Electric facility and then shipped the stolen metal in interstate commerce.

The petitioners were tried before a jury. At the close of the government's case, three (3) of the substantive counts were dismissed. The jury ultimately found both petitioners not

guilty on the remaining four (4) substantive counts, but convicted petitioners of the conspiracy charged in Count One.

Each petitioner's pre-sentence report recommended an eight-level increase in the offense level based upon the value of the copper set forth in each of the substantive counts. Both petitioners objected to the use of conduct of which they had been acquitted to enhance their sentences, and argued that neither the Sentencing Guidelines nor the Fifth Amendment permitted re-litigation of the allegations concerning the substantive thefts of copper once the jury acquitted petitioners of those charges. The District Court rejected these objections and found the value of the stolen copper to be as alleged by the government. The United States Court

of Appeals for the Third Circuit affirmed. The United States District Court for the Western District of Pennsylvania had original subject matter jurisdiction of this case pursuant to 18 U.S.C. Sec. 3231. The United States Court of Appeals for the Third Circuit had appellate jurisdiction of this case pursuant to 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT ALLOWING THE GOVERNMENT TO SEEK CRIMINAL PUNISHMENT BASED UPON ALLEGATIONS REJECTED BY THE JURY AT TRIAL, IN VIOLATION OF PETITIONERS' RIGHT NOT TO BE PUT TWICE IN JEOPARDY, CONFLICTS WITH THE APPLICABLE DECISION OF THIS COURT.

The Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy." Both petitioners were put in jeopardy for each of the alleged thefts of copper when the government sought to persuade a jury to convict them of the seven (7) substantive charges in the indictment. The jury, however, acquitted petitioners of the substantive charges. The government then sought to place petitioners in jeopardy of increased sentences by re-litigating the issue

whether petitioners were criminally responsible for these thefts by seeking a significant enhancement of their sentences based upon the value of the copper allegedly stolen. The District Court, and the Third Circuit, allowed the government to put petitioners in jeopardy a second time during sentencing for the same offenses of which they were acquitted solely on the ground that the government's lower burden of proof at sentencing allowed the government to relitigate issues rejected by the jury at trial.

The concept that the protection offered by the double jeopardy clause may be avoided by the use of a lower standard of proof during a second attempt by the government to prove allegations of criminal conduct is not supported by any language in the Fifth

Amendment and is inconsistent with this Court's decision in Coffey v. United States, 116 U.S. 436 (1886). In Coffey this Court rejected the government's argument that double jeopardy was not implicated by a forfeiture action instituted following an acquittal in a criminal case because the government would have a lighter burden of proof in the forfeiture action.

> [W]here an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person ... It is urged that as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt and that, on the same evidence, on the question of preponderance of proof there might be a verdict for the

> United States, in the suit in rem. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is punishment therefore.

116 U.S. at 443.

Although this Court has since held that collateral estoppel does not prevent the government from re-litigating in a civil case - in which the government must only prove its case by a preponderance of the evidence - issue decided against the government in a criminal case, United States v. One Assortment of Firearms, 465 U.S. 354 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1930), this Court has never held that, under Coffey, double jeopardy does not apply to a second attempt to extract

criminal sanctions under a lower standard of proof. Indeed, this Court's decisions in One Assortment of Firearms, One Lot Emerald Cut Stones, and Helvering, all depended upon the conclusion that the government's second attempt to prove facts rejected in a criminal trial came in truly civil, rather than criminal litigation, in which double jeopardy had no application.

This Court's recognition in Coffey that double jeopardy does not depend upon the standard of proof is consistent with the language and purpose of the Fifth Amendment. In stating that no person shall "be subject to the same offense to be twice put in jeopardy," the Fifth Amendment did not simply give the common law rule of collateral estoppel constitutional stature; the

Fifth Amendment completely prohibited the government from a second attempt at extracting criminal punishment for an alleged crime after a failed first attempt regardless of any procedural differences in the proceedings, including any differences in burdens of proof. Although double jeopardy incorporates the doctrine of collateral estoppel, Ashe v. Swenson, 397 U.S. 436 (1979), it is not limited to the reach of collateral estoppel.

If, as petitioner's contend, Coffey established that the application of double jeopardy does not depend upon varying standards of proof, then the sentencing hearing in this case violated petitioners' double jeopardy rights. Under the Sentencing Guidelines, the sentence the Court had to give was largely dependent upon whether the

government could establish that petitioners were criminally responsible for the thefts set out in the substantive counts of the indictment. Unless the government succeeded in proving these allegations, petitioners could receive no more than six (6) months imprisonment; if the government succeeded, petitioners could receive no less than fifteen (15) months. Petitioners were in jeopardy of conviction and sentencing on these allegations during the trial, and prevailed. The government's successful attempt to seek the same result by relying on the same allegations during the sentencing hearing clearly placed petitioners in jeopardy a second time.

The Court, in Coffey, held that the government could not circumvent a defendant's double jeopardy rights by

relying on varying standards of proof. In allowing the government to seek a sentence based upon acquitted conduct, the Third Circuit rendered an opinion in conflict with Coffey and the petition should therefore be granted.

II. WHETHER DOUBLE JEOPARDY PROHIBITS BASING A SENTENCE UPON CRIMINAL CONDUCT OF WHICH PETITIONERS WERE ACQUITTED BY A JURY PRESENTS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

With the advent of the Sentencing Guidelines the nature and importance of sentencing hearings changed dramatically. Courts no longer exercise discretion in shaping sentences, but rather must sentence within prescribed guidelines once they find that certain offense characteristics exist. This case starkly presents the issue of whether the government, having failed to

prove allegations of criminal conduct at trial, may seek to achieve the same result by seeking to prove that conduct at a sentencing hearing, simply because the standard of proof is lower at the sentencing hearing. Although petitioners contend that this Court decided that the protection against double jeopardy did not hinge upon the standard of proof over 100 years ago in Coffey, to the extent this issue remains unresolved it is of vital importance to the administration of criminal justice in the federal courts.

The constitutional protection against double jeopardy is rooted in the special weight accorded an acquittal. "[W]e necessarily afford absolute finality to a jury's verdict of acquittal - no matter how erroneous its decision." Burks v. United States, 437

U.S. 1, 16 (1978). Although the government may be allowed to make use of evidence that resulted in an acquittal in seeking a conviction for a different crime, Dowling v. United States, 493 U.S. 342 (1990), and may seek appellate review of a sentence, based upon the record as developed before the trial court, United States v. D.Francesio, 449 U.S. 117 (1980), this Court has never held that double jeopardy permits the government to have a second chance to prove that a defendant should be specifically punished for criminal conduct once these allegations have been rejected by a jury.

The only rational offered in support of allowing the government to make a defendant run the gauntlet a second time is that the sentencing proceeding involves a lower standard of

proof. A defendant's right not to be twice placed in jeopardy, unlike the common law right to collaterally estop re-litigation of certain issues, does not depend upon the standard of proof. The protection against double jeopardy is intended to grant finality to a jury's verdict and prevent the government from wearing down a defendant through repeated trials. Allowing the government to seek an enhanced punishment by relying on acquitted conduct, however, directly infringes these important goals regardless of the differences in the standard of proof.

One hypothetical should serve to illustrate the point; the government, rather than bringing all of the charges in one indictment, could seek successive trials for each of the alleged thefts, charging one count for each trial. The

government could lose all but the last trial and then obtain the same sentence as if it had won all the trials by simply seeking to use evidence of each theft - rejected by the previous juries - to enhance the offense level at sentencing for the last offense. The government, of course, would have no incentive to put a defendant through this ordeal if the thefts for which the defendant was acquitted could not be used to enhance his sentence; conversely, the government has little reason not to string out the charges in this manner if it may seek and obtain the same sentence using the acquitted conduct when, having successfully worn the defendants down, it obtains a conviction. In essence, a defendant who obtains an acquittal cannot rest assured that the same allegations of criminal

conduct will not be used later to seek an enhanced sentence on other charges. Allowing the government to relitigate in a sentencing hearing allegations that have been rejected by the jury strikes directly at the heart of the double jeopardy clause, and this Court should grant the petition to determine this issue.

III. IN ALLOWING PETITIONERS' SENTENCE TO BE ENHANCED BASED UPON ALLEGATIONS OF CRIMINAL CONDUCT OF WHICH PETITIONERS WERE ACQUITTED THE THIRD CIRCUIT RENDERED AN OPINION IN CONFLICT WITH ANOTHER CIRCUIT.

Petitioners' sentencing starkly presents the issue whether a criminal defendant can receive an enhanced sentence under the Sentencing Guidelines based upon allegations of criminal conduct of which the defendant was acquitted by the jury. Faced with the

same issue, the United States Court of Appeals for the Ninth Circuit held that acquitted conduct was not relevant under the Sentencing Guidelines and could not be considered in sentencing. United States v. Brady 928 F.2d 844 (9th Cir 1991). The Court observed that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." 928 F.2d at 851. The Court recognized that the Sentencing Guidelines set punishment based upon the crime of conviction, and that a "sentencing court should not be allowed to circumvent this statutory directive by making a finding of fact - under any standard of proof - that the jury has necessarily rejected by its judgment of acquittal." Id. The Court concluded that, as a manner of statutory

construction, acquitted conduct was not relevant to sentencing under the Sentencing Guidelines.

Although a number of circuits have agreed with the position taken by the Third Circuit in this case, see e.g. United States v. Rodriguez-Gonzales, 899 F.2d 177, 180-81 (2d Cir. 1990); United States v. Isom, 886 F.2d 736 (4th Cir. 1989), trial courts following these rulings have not always been willing to consider acquitted conduct in deciding the defendant's offense level. See United States v. Guadagno, 766 F. Supp. 617 (N.D. Ill 1991) (refusing two-point adjustment for obstruction of justice based upon defendant's acquittal on this court.) As a result, some defendants are given the benefit of the jury's verdict while others are not.

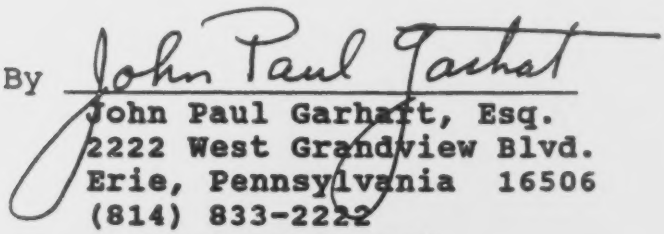
The conflict between Brady and the decision in this case is of crucial importance to the administration of criminal justice under the Sentencing Guidelines. Partial acquittal on multi-count indictments are common, and a rule that ignores the fact that the jury rejected part of the government's proof in sentencing seriously undermines the respect a jury verdict should receive. In essence, the government will obtain the same result if it obtains a conviction on one count as it would if it obtained a conviction on all counts; the sentencing hearing becomes the government's second - and significantly easier - attempt at extracting punishment for allegations of criminal conduct rejected by the jury. This Court should grant the petition to determine whether the Sentencing

Guidelines allow sentences predicated upon acquitted conduct.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that Court's decision affirming petitioners' sentences.

Respectfully submitted,

By 

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